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No. 21

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES B. CAREY, as President of INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, A.F.L.-C.I.O.,

Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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November 2, 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES B. CAREY, as President of International Union of Electrical, Radio and Machine Workers, A. F. L.—C. I. O.,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

No. 485

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court below is set forth in Appendix A to the petition and the opinions and orders of the Appellate Division and Special Term are set forth in the record at pages 134-48 and 116-27. The opinion below is reported at 11 N. Y. 2d 452 (1962) and the opinion of the Appellate Division is reported at 15 App. Div. 2d 7 (1961).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether petitioner (Union) is entitled to specific performance of an alleged agreement by respondent (Company) to submit a grievance to arbitration where:

(a) the Union has been certified by NLRB as majority representative for a unit consisting of "production and maintenance" employees of the Company at one of its plants and has a collective bargaining agreement which obligates the Company to recognize the Union as bargaining agent for the "production and maintenance unit" as certified by the Board;

(b) a second union (Federation) has been certified by NLRB as majority representative of a unit consisting of "salaried technical" employees at the plant in question and has a collective bargaining agreement which obligates the Company to recognize the Federation as the bargaining agent for the "salaried technical unit" as certified by the Board;

(c) each of the aforesaid collective bargaining agreements obligates the Company* to submit to arbitration grievances which involve contract interpretation, application or claimed violation;

(d) the Union's grievance claims that certain employees in the "salaried technical" unit are doing production and maintenance work and, hence, the Company is contractually obligated to recognize the Union as their bargaining agent; and

(e) the result of the requested arbitration (i) would not bind the Federation and (ii) if favorable to the Union would conflict with NLRB unit determinations and representation certifications, whereas proceedings

*Subject to various exceptions not relevant here.

before the NLRB for clarification of the content of the bargaining units involved would effectively resolve the underlying representation differences between the two unions as to which the Company is neutral?

2. Whether the New York courts correctly decided that the arbitration provisions of the collective bargaining agreement between the Union and the Company, construed in light of the *Steelworkers* cases, do not embody the consent of the Company to arbitration of a grievance in which the Union challenges a time value established by the Company under its incentive compensation system?

Statement

I. The Baltimore Grievance.

NLRB, in the exercise of its exclusive and plenary powers under § 9 (61 Stat. 143, as amended, 29 U. S. C. § 159 (Supp. 1959-60), 29 U. S. C. A. § 159 (Supp. 1960)) of the Taft-Hartley Act (Act), has determined two appropriate "units" of employes, for purposes of collective bargaining representation, in the Company's Baltimore X-Ray and Industrial Electronics operations—a production and maintenance unit and a salaried technical unit (Rec. 66-67, ff 197-200). In accordance with those determinations, a predecessor of the Union was chosen by a majority of the employees in the former unit to be their collective bargaining representative and the Federation of Westinghouse Independent Salaried Unions (Federation) was chosen by a majority of the employees in the latter unit to be their collective bargaining representative (*id.* at 67, ff 200-01). In 1955, the Union obtained from NLRB a redetermination of the content of the production and maintenance unit and a new election for that unit. As a result of the new election,

the Union was certified as the collective bargaining representative for that unit (*id.* at 68-69, ff 203-05).

The Company's X-Ray and Industrial Electronics operations in Baltimore include an Engineering Laboratory which develops and makes new, non-standard equipment (*id.* at 66, ff 196-97). Certain types of jobs found in the production and maintenance unit are also found in the Engineering Laboratory—for example, hourly paid machinists do production and maintenance work but the Engineering Laboratory also employs specially skilled machinists, *salaried,* to perform its functions (*ibid.*) The Engineering Laboratory employees, as a group, voted in the representation election in which the Federation was chosen as collective bargaining representative of the salaried technical unit (*id.* at 67, ff 200-01.)

The election notice (describing employees eligible to vote) with respect to the 1955 election in which the Union became collective bargaining representative for the production and maintenance unit did not include the Engineering Laboratory employees who are the subject of the Baltimore grievance (*id.* at 69, f 205). The Union did not protest the description contained in that notice and Engineering Laboratory employees did not vote in that election (*id.* at 69, ff 205-06).

The foregoing history of the Baltimore unit determinations and representation certifications was affirmed by the New York courts at all levels of adjudication (*id.* at 124-25 and 141-42, ff 370-75 and ff 422-24; Pet. App. 19).

The Baltimore grievance claims that Engineering Laboratory employees who perform tasks within the Laboratory, which are similar to tasks performed in production operations, should be in the production and maintenance unit. Prior to the filing of the petition the Union at all times recognized that the basic thrust of the grievance is

to obtain recognition of the Union as bargaining agent for a certain group of Engineering Laboratory employees (and to have its collective bargaining agreement with the Company applied to such employees); Rec. 69-70, ff 207-08, 115, ff 343-44, 27, f 81. The New York courts have confirmed that such was the nature of the Baltimore grievance; *id.* at 125-26, ff 275-76, 142, ff 424-25 and Pet. App. 19.

II. The East Pittsburgh Grievance.

The East Pittsburgh grievance claims that the Company violated the provisions of its collective bargaining agreement with the Union by taking into account, upon revision of a time value assigned to a particular work operation at its East Pittsburgh plant,* several minor changes in work method applicable to that operation which had accumulated over many years prior to the specific change which gave rise to the revision. The Company denied arbitrability on the ground that it had not consented to arbitration of grievances of this sort.

The provisions of the collective bargaining agreement between the parties which bear on whether the Company has consented to arbitration of the East Pittsburgh grievance are: (i) the provisions of subsection D of § XIV-A of the agreement ("Notwithstanding any other provisions of the Agreement, no arbitrator shall . . . Establish or modify . . . any time value under the incentive system."), (ii) the provisions of clause C.(5) of Article XIVA-A (arbitration may not proceed until after a judicial determination of arbitrability), (iii) the provisions of Article VI B, the limited no-strike clause (Union may strike if Company denies arbitrability) and (iv) the provisions of Section XIV 4 and 5 (which show that, while any dispute may be the subject of a grievance, not every grievance is arbitrable under § XIV-A). See App. B and Pet. App. 30-31.

*A "time value" is a measure of compensation under the Company's incentive compensation system.

On the basis of the foregoing contractual provisions, the Court of Appeals and the Appellate Division unanimously interpreted and applied the provisions of the agreement relating to arbitration as not including consent of the Company to arbitration of the East Pittsburgh grievance. See Pet. App. 20 and Rec. 139, ff 415-17.

Argument

I. THE BALTIMORE GRIEVANCE

A. The Decision Below Is Correct.

The issues on certiorari are analyzed in the petition as though provisions of the collective bargaining agreement assigned certain work to the Union and the grievance sought to be arbitrated concerned the interpretation, application or claimed violation of those provisions. The pleadings and the findings of the courts below make clear that the Baltimore grievance is a representation, certification and unit content controversy. Viewed in this perspective, the decision below is a necessary and logical accommodation of the Federal law relating to (i) enforcement of contractual obligations between labor and management as provided for by Section 301 of the Act and (ii) the express and implied requirements of the Act that certain types of labor controversies be determined by NLRB.

The doctrine of "exclusivity" or "primacy" of NLRB jurisdiction over issues under Sections 7, 8 and 9 of the Act originated in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (1947), which held that a state labor board certification of a unit of supervisors must be set aside because Federal law (at that time, the "Wagner Act") had entrusted jurisdiction to NLRB. While the statute did not expressly provide for exclusivity, a Congressional intent to that effect was in-

ferred from the legislative scheme because of considerations of uniformity, special forum for Federal policy implementation, expertise, etc. Subsequent decisions have upheld NLRB exclusivity in respect of certification and representation issues under Section 9 (*La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949) (affirming the *Bethlehem* doctrine under the "Taft Hartley" Act)), and have extended the doctrine to exclude adjudication by state and Federal courts and also state labor agencies of conduct in labor disputes which was arguably either protected under Section 7 or prohibited under Section 8 of the Act. See, *e.g.*, *Garner* v. *Teamsters, Chaffeurs and Helpers Local Union No. 776*, 346 U. S. 485 (1953) and *Weber* v. *Anheuser-Busch*, 348 U. S. 468 (1955), etc. The most recent expansion of the doctrine is *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962), which held that NLRB must initially construe and apply to particular factual situations threshold definitional issues under the Act, such as whether an organization is a "labor organization" within the meaning of Section 2.

Subsequent to the enactment of Taft-Hartley and concurrently with the development of the foregoing body of precedent, this Court has developed a body of precedent relating to the enforceability under Section 301 of collective bargaining agreements, especially agreements to arbitrate disputes. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *American Mfg Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960),* *Dowd*

*American Mfg., Enterprise Wheel & Car and Warrior & Gulf are collectively referred to as the *Steelworkers'* cases.

Box Co. v. *Courtney*, 368 U. S. 502 (1962), *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), *Retail Clerks Internat'l Ass'n* v. *Lion Dry Goods Inc.*, 369 U. S. 17 (1962), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers Internat'l*, 370 U. S. 254 (1962). Those cases establish, among other things, that state and Federal courts must enforce labor management agreements to arbitrate disputes, must apply Federal law to such proceedings and, because of policy implications of Section 301, should, upon finding consent to arbitration, construe the scope of that consent broadly.

In addition to the doctrines of the foregoing cases, the question of the arbitrability of the Baltimore grievance involves the entire scheme of the Act and the Federal labor policies embodied in that scheme.

Concededly, the Company has contractually obligated itself to recognize the Union as collective bargaining agent "for those units wherein the Union or its locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative." (Agreement, Section I 1, Pet. App. 28), including, specifically, the "UNIT" consisting of "All production and maintenance employees of the employer at its Baltimore Works". (Agreement, p. 59, Pet. App. 31-32). The question before the court below in the Baltimore grievance was: In light of all the facts of record in respect of the Baltimore grievance, in what forum should the Union's contention (that a group of Engineering Laboratory employees now represented by the Federation should be represented by the Union) be adjudicated—a question to be answered in terms of the statutory scheme evidenced by the Act and the Federal labor policies embodied in the Act.

Section 7 of the Act guarantees to employees a right "to bargain collectively through representatives of their

own choosing". Sections 8(a)(1) and (3) obligate the Company to remain neutral in respect of representation controversies between rival unions. Section 9 entrusts to the NLRB exclusive jurisdiction to determine what units of employees constitute appropriate units for purposes of conducting representation elections in which employees may exercise their rights guaranteed by Section 7. Section 8(a)(5) obligates the Company to bargain collectively with the Federation as the certified representative of employees in the salaried technical unit at its Baltimore plant and would make it an unfair labor practice on the part of the Company to fail to do so. The collective bargaining agreement between the Company and the Federation (which is the result of their good faith bargaining as required by Sections 8(a)(5) and 8(b)(3)) is enforceable by virtue of the provisions of Section 301. The entirety of the Act is designed, in the national interest, to promote industrial peace and to eliminate industrial strife (both strife between labor and management and strife between rival labor organizations).*

In the face of that statutory framework and those paramount statutory policies, the answer to the legal issue resolved against the Union in the decision below is clear. The Union's claim that its production and maintenance unit at the Company's Baltimore plant should include the disputed group of Engineering Laboratory employees now included in the Federation's salaried technical unit at that

*As this Court recognized in *NLRB* v. *Radio and Television Broadcast Engineers*, 364 U. S. 573 (1961), Sections 8(b)(4) and 10(k) of the Act evidence a strong national policy that employers should not be gored in disputes between two rival unions. Section 301 also recognizes that policy in providing for enforcement of inter-union agreements resolving, or providing for arbitration to resolve, union disputes over work assignments and organizational "jurisdiction". See *Local 33, Internat'l Hod Carriers* v. *Mason Tenders District Council*, 291 F. 2d 496 (2d Cir. 1961) and *United Textile Workers of America* v. *Textile Workers Union of America*, 258 F. 2d 743 (7th Cir. 1958).

plant arose from NLRB unit determinations and representation certifications, should now be resolved by NLRB proceedings and can be effectively resolved only by such proceedings.

The Union has the right to file a Section 9 petition with the Board seeking clarification of its unit. The Board has resolved questions as to whether a single employee ought to be included in a given unit (*Westinghouse Electric Corp.*, 138 N. L. R. B. No. 90 (1962) and would unquestionably entertain a clarification motion involving the "More than 50% of the production and maintenance workers" which the Union alleges to be involved in the Baltimore grievance (Rec. 104, f 310). If for any reason the Board should decline to entertain a clarification motion, the Union could force a Board adjudication by requesting a certification election in Baltimore and proposing, in connection with that request, that the election unit include the disputed group of employees. The Union's right to Board action on such a petition would be absolutely certain, although the Board might limit the election to one in which only the disputed group of employees voted to choose as between the Union and the Federation.*

The NLRB proceeding under Section 9 would be a proceeding in which the Federation could intervene to protect its salaried technical unit and the agency supervised election would be one in which the Federation could protect its representation jurisdiction and the employees affected could exercise their choice between the two rival unions. Whether or not the Federation should intervene, it would be bound by the results. Thus a final adjudication binding on all interested parties and according to all interested parties their statutory rights can only be achieved through NLRB proceedings.

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*The "contract bar" rule, if applicable here, could postpone, but not prevent, such an election.

If the Union had obtained arbitration with the Company of the Baltimore grievance and been successful in that arbitration, the results would be completely inconsistent with Federal labor policies and the statutory scheme provided by the Act. An arbitrator's award obligating the Company to bargain exclusively with the Union in respect of the disputed employees would not dispense the Company from its statutory obligation to bargain with the Federation in respect of those employees or its contractual duty to recognize the Federation as their bargaining agent. The arbitration proceeding would not be an adversary proceeding because the Company is, and must be, neutral in respect of its subject matter. Not only would the Federation not be bound by the arbitrator's award but, if the Company complied with it, the Federation could (i) institute an unfair labor practice complaint with NLRB for refusal to bargain, (ii) call a strike over the dispute (and thus force the matter into NLRB under Section 8(b)(4) and 10(k)) or (iii) obtain an arbitrator's award under its contract with the Company which might be inconsistent with the Union's arbitration award. If, on the other hand, the Company felt constrained to refuse to honor the Union's arbitration award, it would be forced to go to NLRB under Section 9 to obtain an adjudication of the underlying issues and that adjudication, if contrary to the arbitrator's award, would obviously override it. Furthermore, absent NLRB action, the statutory rights of the employees affected will be ignored.

NLRB action in respect of the situation underlying the Baltimore grievance is, in one way or another and at one time or another, inevitable. Postponement of agency action until after a meaningless *ex parte* arbitration between the Company and the Union is not calculated to eliminate industrial strife but to increase it and to interject a period of chaos in the relations among the parties.

On the basis of all the foregoing factors it seems unarguable that, under the facts and circumstances of the Baltimore grievance, the orderly procedures contemplated and provided for by the Act require that the Union's grievance be adjudicated by NLRB and, accordingly, the decision below is clearly correct.*

The petition, in an effort to depict an important question of Federal law, incorrectly attributes a sweeping effect to the decision below. The uncontested facts of this case with respect to bargaining history, prior NLRB unit determinations, prior certification elections and the character of the Union's grievance all contributed to the result below. Special Term distinguished the Baltimore grievance from

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*If the Union were to insist that the Company bargain with it in respect of both the production and maintenance unit and the disputed group of Engineering Laboratory employees, the Union would clearly be guilty of an unfair labor practice. See *Internat'l Longshoremen's Ass'n*, 118 N. L. R. B. 1418 (1957) and *Douds* v. *Internat'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957). In the *Longshoremen's* situation, NLRB obtained a discretionary injunction under Section 10(j) against ILA for insisting on bargaining beyond a unit. See *Douds* v. *Internat'l Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957). The intermediate report in the NLRB proceeding, affirmed by the Board, and the District Court decision in the injunctive proceeding, affirmed by the Second Circuit, emphasized that union efforts to bargain beyond the certified unit frustrate NLRB's statutory duty to determine the appropriate unit and that the Board's findings as to an appropriate unit relieve an employer of any duty to deal with any bargaining representative on any other basis. See 118 N. L. R. B. at 1491 and 147 F. Supp. at 111. The Court of Appeals for the District of Columbia, in reviewing the Board's order, stated: "ILA is asking this court to place it in a position to cover employees who have not elected ILA as their bargaining representative. If the employees from Maine to Texas choose ILA, and if the Board shall then certify ILA, it will have gained Board recognition for the industry-wide representation status it seeks. But it is one thing to achieve that status within the ambit of the legislation and another thing to gain it by this court's fiat" (277 F. 2d 681, 682-83). It would indeed be anomalous if the Union were permitted to obtain through arbitration of the Baltimore grievance an objective which would have been illegal for it to seek at the bargaining table and unattainable to it in the courts.

a grievance which "presented only a superficial change of [job] title, with no involvement of the rights of another union, or of other employees, to choose their bargaining agent in accordance with prior certification of respective bargaining units." (Rec. 127, ff 379-80). The Appellate Division, distinguishing between situations "where the question of contract breach is direct and the question of representation is peripheral" stated that "the field is not pre-empted" and based its conclusion that "orderly process is best served and contract principles are not violated by limiting jurisdiction of the issue here to the NLRB" on the particular facts of the Baltimore grievance (*id.* at 142-44, ff 426-30). The Court of Appeals incorporated by reference the conclusions of fact of the Appellate Division and quoted those portions of *Marine Engineers, supra,* which reiterate those aspects of the rationale of the pre-emption doctrine which require deference to NLRB in the present controversy.*

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*With only a nod to the record, the petition addresses itself, in a footnote (n. 4, p. 11), to the "assumption" that the issues raised by the Baltimore grievance "touch matters which the Board might consider in a certification proceeding before the Board pursuant to Section 9". The footnote finds no obstacle to an order to compel arbitration on this "assumption" because (a) the Act contemplates that employers and unions may agree upon appropriate units for bargaining purposes and (b) such agreements are deferred to by the Board unless inconsistent with statutory policy. The footnote concludes with the proposition that Section 9 does not impose limitations on Section 301, citing (i) *Retail Clerks Internat'l Ass'n* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962) (holding that an employer may not challenge a union's majority status when sued under Section 301 for enforcement of its agreement with the union) and (ii) *United Textile Workers of America* v. *Textile Workers Union of America*, 258 F. 2d 743 (7th Cir. 1958) (holding that a "no raiding" agreement between two unions (and an arbitrator's decision thereunder adverse to the defendant union) is enforceable under 301 even though it obligates defendant to withdraw a Section 9 petition filed with the Board). It is, of course, equally true that Section 301 does not impose limitations on Section 9.

II. THE PETITION SHOWS NO CONFLICT

Dowd Box, supra, held that Section 301 does not deprive state courts of jurisdiction over controversies cognizable thereunder. *Lucas Flour, supra,* another Section 301 case, held that where the arbitration provisions of a collective bargaining agreement cover a given dispute, they implicitly embody an agreement not to strike in respect of the dispute. *Sinclair Refining, supra,* held that, where an employer does not have a right under a collective bargaining agreement to obtain arbitration of its grievance against a union, the employer is entitled to a judicial adjudication of the dispute under Section 301. The underlying disputes in those cases did not involve questions of bargaining representation, appropriate bargaining unit, inter-union rivalry or the rights of employees to choose their own bargaining representative.

The petition asserts conflict with these cases, presumably because *Dowd Box* rejected an argument that Section 301 requires the type of single forum uniformity which is sometimes achieved by limiting jurisdiction over Federal questions to Federal courts (see 368 U. S. at 513), *Lucas Flour,* elaborating on the *Dowd Box* opinion, referred to Taft-Hartley legislative history in which Congress rejected a proposal to make breach of a collective bargaining agreement an unfair labor practice, thereby rejecting the idea that NLRB should police such agreements (see 369 U. S. at 101) and *Sinclair Refining* rejected an extremely farfetched claim of NLRB preemption (see 370 U. S. at 245).

The footnote, referred to above, in the *Lucas Flour* opinion stated that the "preemption" doctrine was inapplicable to that case and cited with approval several lower court decisions which hold that a contract grievance otherwise arbitrable may not be withheld from an arbitrator because

it involves conduct which might also constitute an unfair labor practice under Section 8 of the Act. The decision below is readily distinguishable from those lower court cases. The latter cases hold that the existence of rights and remedies under Section 8 of the Act in respect of any given fact situation does not operate to deprive a party to a collective bargaining agreement of any contract right or remedy he may have thereunder.

The "unfair labor practice" grievance cases do not conflict with the decision below or its rationale. An employer may agree with a union not to discriminate against union members even though the Act also forbids such discrimination. If the employer violates its agreement by discharging employees because of union membership, neither statute nor policy precludes enforcement of the contract right against discrimination or an arbitrator's award of back pay to the injured employees. There is no possibility of conflict with an NLRB decision because, even if the union or the affected employees pursued their statutory remedy, an agency determination that the employer had not discriminated within the meaning of the statute (i) would not be inconsistent with the arbitrator's determination that it had discriminated within the meaning of the contract and (ii) would never give rise to an NLRB order forbidding the employer to make up back pay. In addition, in "unfair labor practice" grievances, no second union is involved, employees' statutory rights are unaffected and ultimate Board action in the situation is highly unlikely.

Far from any conflict, the decision below is in accord with every other decision in which similar issues have been raised. See *Raytheon Co.* v. *Local No. 1505, Internat'l Brotherhood of Electrical Workers*, 304 F. 2d 365 (1st Cir. 1962) (petition for writ of certiorari filed Sept. 6, 1962, No. 419, Oct. Term 1962); *Intern'l Chemical Workers Union, Local 6* v. *Olin Mathieson Chemical Corp.*,

202 F. Supp. 363 (S. D. Ill. 1962); *Retail Clerks* v. *Food Fair Stores*, 48 LRRM 2284 (E. D. Pa. May 3, 1961); *Amperex Electronic Corp.* v. *Rugen*, 284 App. Div. 808, 132 N. Y. S. 2d 93 (2d Dep't 1954); and *Madison Glass Specialty Co., Inc., In re*, N. Y. L. J., July 3, 1961, p. 3 (Sup. Ct. N. Y. Cty.). See also *Klein* v. *Styl-Rite Optics, Inc.*, 8 App. Div. 2d 811, 188 N. Y. S. 2d 421 (1st Dep't 1959) and *Local 459, Intern'l Union of E. R. & M Workers* v. *Remington Rand*, 191 N. Y. S. 2d 876 (Sup. Ct. N. Y. Cty. 1959).*

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*While the petition is aimed at the "straw man" that the Baltimore grievance is a work assignment dispute under the collective bargaining agreement between the parties, curiously, it makes no reference to those lower court decisions which genuinely did involve the arbitrability of disputes with respect to contract provisions assigning certain work to union members. See *Freight Drivers and Helpers Local 557, Etc.* v. *Quinn Freight Lines, Inc.*, 195 F. Supp. 180 (D. Mass. 1961) with *New York Mailers' Union, Local 6* v. *New York Times*, 43 Lab. Cas. Par. 17, 309, N. Y. L. J. Oct. 28, 1961, p. 12 (Sup. Ct. N. Y. Cty.) and *New York Mailers' Union, Local 6* v. *Publishers' Ass'n of New York City*, 43 Lab. Cas. Par 17, 310, N. Y. L. J. Nov. 28, 1961, p. 13 (Sup. Ct. N. Y. Cty.).

It is equally curious that the petition labors the proposition that NLRB certifications are certifications with respect to units of employees and do not import any assignment of work to any particular employee group (a proposition with which the Company wholeheartedly agrees). The provision of the collective bargaining agreement which the Union claims in the Baltimore grievance to have been violated by the Company is the clause which requires the Company to recognize the Union "for those units where the Union or its Locals, through a lawful National Labor Relations Board certification, have been lawfully designated as the exclusive bargaining representative" (Pet. App. 28, 31-32). *McDonnell Aircraft Corp.*, 109 N. L. R. B. 930 (1954), so heavily relied on by the Union, held that work assignments may be covered by collective bargaining agreements (and, if so covered in an agreement with an appropriate arbitration clause, disputes with respect to work assignments should be arbitrated rather than brought before the Board under Section 8). *Mc Donnell* seems to the Company to emphasize the fact that an agreement must contain something more than an obligation to recognize a union in respect of the unit for which it has been certified in order to constitute an agreement to assign work to the employees represented by the union.

II. THE EAST PITTSBURGH GRIEVANCE.

The decision below, in response to the mandates of Section 301 as construed by this Court and the express provisions of the collective bargaining agreement between the parties,* addressed itself to the question of whether the East Pittsburgh grievance was "covered by the provisions of the collective bargaining agreement which provided for arbitration" (Pet. App. 20). In doing so, it rejected the Union's contention that all arbitration provisions should be blindly equated with those before this Court in the *Steelworkers'* cases. It accepted the Company's contentions that the collective bargaining agreement between the Company and the Union was not a bargain for industrial peace at any price in exchange for comprehensive arbitrability, but a bargain by which the Company specifically contracted for judicial review of arbitrability in advance of arbitration and the Union specifically bargained for the right to call a strike if the Company should challenge arbitrability. In short, the Court of Appeals found no evidence of a bargain for "therapeutic" arbitration. Proceeding from those conclusions to the nature of the East Pittsburgh grievance and the conclusive evidence in the arbitration provisions of the agreement that "time values" were not to be the subject of arbitration, the Court of Appeals construed the agreement to mean that the Company had not consented to arbitration of the East Pittsburgh grievance.**

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*Specifically, Section XIV-A C (5) calling for advance judicial determination of arbitrability (Pet. App. 30).

**Judge Fuld, who dissented in respect of the Baltimore grievance, was in accord with the remainder of the Court of Appeals (and the five Justices of the Appellate Division) in the construction of the arbitration provisions of the agreement and their application to the East Pittsburgh grievance.

In its approach to the East Pittsburgh grievance, the Court of Appeals was faithful to the clear mandate of the *Steelworkers* cases, *viz.*, that Federal labor policy:

> (i) specifically rejects compulsory arbitration (except in the transportation industry);
>
> (ii) requires the consent of both parties to any proposed arbitration of an industrial dispute; and
>
> (iii) while favoring broad interpretation of arbitration provisions and collective bargaining agreements, requires that the courts affirmatively determine, as a matter of fair contract interpretation giving effect to the expressed intent of the parties, that such provisions do embody consent to the particular dispute sought to be arbitrated.

The mandate of the *Steelworkers* cases is not only that courts must, under Section 301, limit themselves to determining the intention of the parties with respect to whether any given dispute should be arbitrated but also that the arbitration provisions of each collective bargaining agreement (which range from broad arbitration clauses covering "any dispute", coupled with an unqualified no strike clause, to the more limited provisions found in the agreement between the Company and the Union, coupled with a no strike clause which is specifically inapplicable where arbitration is not available) must be conscientiously interpreted and applied and that no arbitrary rules (such as a requirement that the underlying dispute be bona fide) can be employed by the judiciary.

The Union, unhappy with the interpretation and application by the New York courts of the arbitration provisions of its collective bargaining agreement with the Company in respect of the East Pittsburgh grievance, takes the position

in its petition that this Court should sit to review every lower court interpretation and application of arbitration provisions in collective bargaining agreements wherever the result is against arbitrability, notwithstanding that the lower court have faithfully implemented the principles of the *Steelworkers* cases. In so doing, the Union misreads those cases for they were clearly a mandate to implement contractual intention and not a mandate for mechanical judicial routing of grievances to arbitrators.

Certainly the fact that application of the *Steelworkers'* doctrines to the facts of this case requires denial of arbitrability does not indicate any conflict with *Steelworkers*. The Union suggests no valid reason why this Court should review particular applications of the *Steelworkers'* cases and particular contract interpretations thereunder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2, 1962.

APPENDIX A

Additional Provisions of Statute Involved

In addition to Sections of the Labor Management Relations Act, 1947, set forth in Appendix B to the petition, the following Sections of that Act are involved:

SEC. 7.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title. (29 U. S. C. § 157)

SEC. 8(a)(1), (3) and (5).

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of

section 9(a) of this title. (29 U. S. C. § 158(a)(1) (3) and (5), as amended, 29 U. S. C. A. § 158(a) (3) (Supp. 1961)

SEC. 8(b) (3).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title. . . . (29 U. S. C. § 158(b) (3))

SEC. 9(a) and (b):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . (29 U. S. C. § 159(a) and (b))

APPENDIX B

Additional Provisions of the Collective Bargaining Agreement Between the Parties

SECTION VI—STRIKES, STOPPAGES AND LOCKOUTS

A. Subject to the provisions of Section XVIII hereof, the Union and the Locals will not cause or officially sanction their members to cause or take part in any strike (including sit-downs, stay-ins, slow-downs, or any other stoppage of work) during the life of this Agreement. This includes disputes which are within the proper scope of the grievance procedure provided in this Agreement or the applicable local supplement (a) until such grievance procedure has been fully exhausted, and (b) thereafter except as provided in Paragraph B below . . .

. . . When the Company has questioned the arbitrability of a grievance under Section XIV-A subparagraph C.5, the Local shall have the right to strike in support of such grievance, after satisfying condition (c) of this paragraph.

* * * * *

SECTION XIV—SETTLEMENT OF DISPUTES

4. The Union and the Company may consider referring a grievance to arbitration in accordance with Section XIV-A by mutual agreement at any time.

5. Should the parties fail to resolve any grievance subject to arbitration under Section XIV-A after exhausting the grievance procedure at the national level, the provisions of Section XIV-A shall apply.